

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

IN RE ORDER INSTITUTING
RULEMAKING

D.T.E. 01-72

**INITIAL COMMENTS OF THE PIONEER VALLEY TRANSIT AUTHORITY
ON THE PROPOSED AMENDMENT TO 220 C.M.R. 155.00 et seq.**

The Pioneer Valley Transit Authority (“PVTA”) hereby submits the following comments on the proposed amendment to 220 C.M.R. 155.00 et seq., an amendment that would prohibit the owner or operator of a motor bus from displaying an advertising wrap on a bus’s “passenger side windows.” 220 C.M.R. 155.02(34) (as proposed). The PVTA believes that the Department of Telecommunications and Energy (“DTE”) should reject or revise the proposed amendment because as currently formulated it: (1) arbitrarily and capriciously draws a distinction between advertising wraps and window tinting; (2) is not necessary to ensure public safety; and (3) will have a significant, unjustifiable and unnecessary fiscal impact on the operations of the PVTA during a time of fiscal cutbacks at the state level, thereby causing irreparable injury to the citizens who depend upon the PVTA for their daily transportation needs.

BACKGROUND

The PVTA is the largest regional transit authority in the Commonwealth, serving twenty-four communities within the Pioneer Valley. Since 1996, the PVTA has been wrapping certain of its buses with “Bus\Full\ad Wrap” advertisements, otherwise known as advertising wraps. See Affidavit of Gary A. Shepard at ¶7 (attached hereto as Exhibit A). Such advertising wraps

cover the entire outside of the buses including the windows, with the exception of the windshield, the driver-side window, and the windows on the bus's door. These advertising wraps have provided the PVTa with a crucial source of revenue necessary to maintain the PVTa's level of service throughout the Pioneer Valley region. Id. at ¶6. There has never been any act of violence, crime or terrorism on any PVTa bus attributable to the presence of an advertising wrap. Id. at ¶7.

At present, a total of seven out of a fleet of approximately two hundred buses contain advertising wraps that cover bus windows -- three displaying public service messages and four displaying commercial messages pursuant to long-term contracts with various advertisers. Id. at ¶¶4-5. Of the four paid-advertising wraps, contracts for three terminate on or before October 2002; the contract for the fourth paid-advertising wrap does not expire until May 2004. Id. at ¶5. The total future revenue the PVTa expects to receive from these contracts exceeds \$50,000. Id. at ¶6.

The proposed amendment to 220 C.M.R. 155.00 et seq. makes a single revision to the regulations, adding a new subsection regarding advertising wraps. The new subsection provides that "No owner and/or operator shall display ad wrap material on passenger side windows of a motor bus." 220 C.M.R. 155.02(34) (as proposed). The proposed amendment makes no other change to the existing regulations contained at 220 C.M.R. 155.00 et seq. In particular, the proposed amendment makes no change to the existing regulation that permits transparency-changing window tinting on a bus's side windows. See 220 C.M.R. 155.04(10)(e).

I. The Proposed Amendment Arbitrarily and Capriciously Draws a Distinction Between Advertising Wraps and Window Tinting.

The DTE should reject the proposed amendment because it draws an arbitrary and capricious distinction between advertising wraps and other alterations to a bus's windows that

affect the visibility of the bus's interior. In its Order Instituting Rulemaking, the DTE states that because an advertising wrap "prevents the interior of motor vehicles from being viewed from the outside," such a wrap "presents a threat to the safety of operators and passengers aboard vehicles maintained by RTAs." D.T.E. 01-72, Order Instituting Rulemaking at 2. These assertions are the sole basis offered by the DTE in support of the proposed amendment. Put another way, DTE's only proffered justification for amending the regulations is that: 1) the advertising wraps make it difficult to see inside into the buses from outside; and 2) this difficulty results in increased risk to operators and passengers because law enforcement personnel would not be able to see inside if criminals or terrorists took over one of the buses. However, the DTE has not provided a single shred of factual support for either of these two propositions. Indeed, the facts as they relate to the PVRTA are quite to the contrary: not one single incidence of violence or other trouble has occurred on a PVRTA bus with advertising wrap. Without such factual support, it would be arbitrary and capricious of the DTE to adopt the proposed amendment. See Massachusetts State Pharmaceutical Ass'n v. Rate Setting Comm'n, 387 Mass. 122, 126 (1982).

Moreover, even if the DTE were to provide factual support for each of its two propositions, the proposed amendment would still be arbitrary and capricious because it fails to amend the DTE's existing regulation concerning window tinting. Under existing DTE regulations, window tinting that changes the transparency of a bus's windows is prohibited only on the bus's windshield, rear window, and side windows that are "immediately adjacent to the operator and front passenger seat and the windows immediately to the rear of the operator and front passenger seat." 220 C.M.R. 155.04(10)(e). In other words, other than on the front two windows of each side, the current regulations permit transparency-changing tinting on a bus's side windows. Under the logic of the DTE's proposed amendment, however, such transparency-

changing tinting would be just as much of a threat to public safety as advertising wraps -- members of law enforcement would have their visibility into a bus's interior similarly affected in either case. Yet the proposed amendment does not alter the current DTE regulations concerning window tinting in any way. Indeed the impact of this proposed regulation would have a disproportionately negative impact on the poor, elderly and student population of the Pioneer Valley, who depend on the PVTA as their sole means of transportation and who benefit from the service provided, in part, by PVTA advertising revenue, as opposed to the wealthy few who are able to take excursion buses to casinos and other venues using the comfort of tour buses with tinted windows. So long as the proposed amendment draws an arbitrary distinction between windows covered by advertising and windows covered with tinting material, the amendment must fail.

II. The Proposed Amendment is Not Necessary to Ensure Public Safety.

The DTE asserts that the proposed amendment is necessary to ensure public safety because of “recent events of terrorists” and “the tragic events of September 11.” D.T.E. 01-72, Order Instituting Rulemaking at 1, 2. Yet the DTE has presented no evidence that full advertising wraps have any connection whatsoever to terrorist activity. The PVTA is not aware of a single report of terrorists targeting buses anywhere in the United States, let alone in Massachusetts. If buses with full advertising wraps presented even the slightest risk of being terrorist targets, they certainly would have been banned from the recent Winter Olympics, an event that generated an unprecedented amount of security. Yet a number of the buses used in Salt Lake City during the Olympics had full advertising wraps. See UTA Achieves Milestones Helping Commuters Make ‘The Smart Choice’, Passenger Transport, October 29, 2001 (attached hereto as Exhibit B) (containing photograph of Salt Lake City bus wrapped with Olympic logo).

The DTE has offered no explanation for why full advertising wraps, deemed acceptable at what was widely recognized at the time to be one of the most likely terrorist targets in the United States, present a security risk here in Massachusetts.

In contrast to what the DTE is attempting to do in Massachusetts, transit systems in other parts of the country have responded to the horrific events of September 11 not by restricting full advertising wraps, but by affixing patriotic full advertising wraps to buses. Since September 11, the Port Authority of Allegheny County (in Pennsylvania), the Riverside Transit Agency (in California), the Toledo Regional Transit Authority (in Ohio), and the Central Ohio Transit Authority have all adorned buses with patriotic, flag-themed full advertising wraps. See America Under Threat: Transit Responds to Terrorism, Passenger Transport Special Report, at 28-29 (attached hereto as Exhibit C). If full advertising wraps truly posed a threat to public safety, as the DTE contends, other transit authorities around the country would not have added new wraps to buses after September 11. It is deeply ironic that while other communities have chosen to react to the horrors of September 11 by using full advertising wraps to express their support for their country, the DTE is seeking to ban such wraps altogether, and deprive regional transit authorities of important sources of revenue.

The sole incident referenced by the DTE in its Order Instituting Rulemaking involved a robbery of a bus bound for Foxwoods that, while disturbing, bears no relation to terrorism. While it is true that the bus did have a full advertising wrap, the DTE's assertion that the wrap prevented the police from detecting the presence of the robbers inside the bus is wholly unfounded. Despite the DTE's statements in its Order Proposing Rulemaking, there is no

suggestion in any of the news reports that the police officers were unable to detect the robbery because of the full advertising wrap on the bus. To the contrary, the Boston Herald reported that “[d]uring the robbery, a Dedham police officer in the parking lot *saw something suspicious and approached the bus.*” Jules Crittenden, Bandits Rob Bus Bound for Foxwoods, Boston Herald, Oct. 13, 2001 (attached hereto as Exhibit D) (emphasis added).

Nor is there any basis whatsoever to support speculation that the robbers targeted the bus because it contained an advertising wrap or that the advertising wrap helped the robbers evade the police. According to published news reports, the robbers targeted the bus *because they knew it was bound for a casino and that people on the bus would therefore likely be carrying significant amounts of cash.* See Crittenden, supra. In addition, the robbers knew that the driver would be carrying an envelope containing hundreds of dollars in cash, since the driver collects the \$25.00 fare for each passenger on the bus. See Marie Szaniszlo, Woman is Charged in Robbery of Casino Bus, Boston Herald, Jan. 5, 2002 (attached hereto as Exhibit E). Thus, this sole incident referenced by the DTE in its Order Proposing Rulemaking provides no support for the DTE’s assertion that the proposed amendment is necessary to ensure public safety.¹

III. The Proposed Amendment Will Have an Unjustifiable and Unnecessary Fiscal Impact on the Operations of the PVRTA.

Adoption of the proposed amendment will have a significant negative fiscal impact on the operations of the PVRTA -- placing the PVRTA in breach of contract with its advertisers,

¹ A Massachusetts Superior Court judge necessarily reached the same conclusion when he preliminarily enjoined the DTE from enforcing an order that the PVRTA remove the full advertising wraps from its buses. See Pioneer Valley Transit Auth. v. Department of Telecomm. & Energy, Hampden Super. Ct., C.A. No. 01-1095. In granting the injunction to the PVRTA, the judge implicitly rejected an argument by the DTE that the Dedham incident proved that full advertising wraps are conducive to crime and detrimental to public safety.

opening the PVTA up to potential lawsuits and potential damage awards, and possibly preventing the PVTA from collecting revenue otherwise owed it. These negative impacts will have an impact on the poor, elderly and student population that depend upon the PVTA for local and regional transportation.

The PVTA currently has two contracts with two different advertisers that require it to run full advertising wraps on its buses. One of the contracts, for three buses, expires at the end of September 2002. The second of the two contracts, for one bus, expires at the end of April 2004. If the proposed amendment is adopted and the PVTA is forced to remove the full advertising wraps, the PVTA will be in breach of both contracts. The PVTA will face the risk that its advertisers will sue for breach of contract and seek money damages as a remedy for the breach. The PVTA will also likely be unable to collect the more than \$50,000 that it would be owed under the future life of the two contracts. The PVTA's advertisers would likely attempt to withhold payment under the contracts based on the PVTA's breach.

This significant fiscal impact could be mitigated if the DTE were willing to revise the proposed amendment to include a "grandfather clause" that would permit existing paid full advertising wraps to remain on buses until the end of the applicable contracts. If the DTE were to agree to such a revision, the PVTA would have no opposition to the adoption of the proposed amendment. Such a revision would not affect any transit authority other than the PVTA since the PVTA is the only transit authority that presently has full advertising wraps on any of its buses. Such a revision would also allow the PVTA to avoid any of the fiscal effects discussed above, while permitting a mere four buses to retain their full advertising wraps for a limited

period of time. Even with such a revision to the amendment, three of the buses would retain their wraps only until the end of September 2002. As of October 1, 2002, only a single bus in the entire Commonwealth of Massachusetts would have a full advertising wrap. Thus, a slight revision to the proposed amendment would allow the PVRTA to avoid any negative fiscal effects while still allowing the DTE to accomplish its goal of ensuring that buses in the Commonwealth remain free of full advertising wraps.

CONCLUSION

For the reasons set forth above, the PVTA requests that the DTE reject or revise its proposed amendment. As currently formulated, the proposed amendment: (1) arbitrarily and capriciously draws a distinction between advertising wraps and window tinting; (2) is not necessary to ensure public safety; and (3) will have an unjustifiable and unnecessary fiscal impact on the operations of the PVTA. However, if the amendment were revised to permit paid full advertising wraps to remain on buses until the end of their applicable contracts, the PVTA would withdraw its objections to the proposed amendment.

PIONEER VALLEY TRANSIT
AUTHORITY,

By its attorneys,

James A. Aloisi, Jr. (BBO #016080)
Matthew S. Axelrod (BBO #639703)
HILL & BARLOW,
A Professional Corporation
One International Place
Boston, MA 02110
(617) 428-3000

Kevin M. Walkowski (BBO #559242)
Pioneer Valley Transit Authority
2808 Main Street
Springfield, MA 01107
(413) 737-0477

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